APPENDIX A

IN THE

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 81-1571

UNITED STATES OF AMERICA ex rel. BENEDETTO J. MASSARELLA,

Petitioner-Appellant,

v.

RICHARD J. ELROD, Sheriff of Cook County, Illinois and TYRONE FAHNER, Attorney General of Illinois,

Respondents-Appellees.

Appeal from the United States District Court for the Northern District of Illinois.
No. 81 C 1752—Nicholas J. Bua, *Judge.*

Argued January 15, 1982—Decided July 14, 1982

Before CUDAHY, *Circuit Judge,* PECK* and FAIRCHILD,

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* Honorable John W. Peck, Senior Circuit Judge for the Sixth Circuit Court of Appeals, sitting by designation.

Senior Circuit Judges.

PECK, *Senior Circuit Judge.* Massarella appeals from the denial of his petition for a writ of habeas corpus. He raises numerous issues on appeal, but only one is of moment. That issue is whether Massarella's conviction of the felony of perjury in Illinois' courts violated the *ex post facto* clause of the Federal Constitution. U.S. Const. art. I §10, cl. 1.

The facts of Massarella's case are cited in detail in *People* v. *Massarella,* 400 N.E. 2d 436 (Ill. App. 1979) *cert. denied, Massarella* v. *Illinois,* 449 U.S. 1077 (1981), and will be stated only briefly here. In 1973 an Illinois jury found Massarella guilty of conspiracy, theft, and one count of perjury. He was sentenced to five years' probation, including two years' periodic imprisonment, for the theft, and one to three years' imprisonment for the perjury. The sentences were to run concurrently. Massarella was also fined, but the present record is not clear on the total amount, nor on the offenses for which fines were imposed.[1]

The history of Massarella's perjury conviction is a convoluted one. Massarella was indicted on June 8, 1973, for statements made around August 30, 1971. At the time of the commission of the perjury, the offense was an "indictable misdemeanor," punishable as either a misdemeanor

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[1] *People* v. *Massarella,* 368 N.E. 2d 507, 508 (Ill. App. 1977) reports $10,000 fines for both the theft and perjury convictions. The Illinois Supreme Court, reversing, noted only one $10,000 fine, but did not tie it to any offense. See 382 N.E. 2d 262, 263 (Ill. 1978). On remand, the Illinois Court of Appeals noted only one fine imposed on Massarella individually. See 400 N.E. 2d 436, 441 (Ill. App. 1979).

or a felony. See Ill. Rev. Stat. ch. 38, § 32-2 (1969).[2] At the time of Massarella's indictment, the offense was a "pure" felony. See Ill. Rev. Stat. ch. 38, § 32-2 (1973). The change was effected by the Illinois Unified Code of Corrections, which, Massarella argues, also extended the limitation period for prosecution of perjury from eighteen months to three years. The extension took effect in January of 1973, approximately one month before the former eighteen month statute would have barred Massarella's perjury prosecution. (Massarella was not indicted until about twenty-two months after the perjury was committed.) In this appeal, Massarella argues that, as applied to his case, both the extension of the limitations period and the reclassification of the perjury from "indictable misdemeanor" to felony violate the *ex post facto* clause of the Constitution.

Massarella's objection to the enlargement of the limitation period has no merit. Extending a limitation period *before* a given prosecution is barred does not violate the *ex post facto* clause. *Clements* v. *United States*, 266 F.2d 397, 399 (9th Cir.), *cert. denied*, 359 U.S. 985 (1959). As

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[2] An indictable misdemeanor is a relatively new type of offense, created over the last decade or two in connection with new types of criminal conduct, as to which conduct the legislature appears to wish to give the State and/or trial judge a broad discretion in respect of penalty, ranging from the felony penalties of imprisonment in the State penitentiary for more than one year and/or a fine, to the misdemeanor penalties of imprisonment in a correctional institution other than the penitentiary for not more than one year and/or a lessor [sic] fine. *People* v. *Houston*, 315 N.E.2d 192, 195 (Ill. App. 1974), *cert. denied*, *Houston* v. *Illinois* 420 U.S. 936 (1975).

the Supreme Court recently noted, "no *ex post facto* violation occurs if the change effected is merely procedural, and does 'not increase the punishment nor change the ingredients of the offense or the ultimate facts necessary to establish guilt.'" *Weaver* v. *Graham*, 450 U.S. 24, 29 n.12 (1981), *quoting Hopt* v. *Utah*, 110 U.S. 574, 590 (1884). The extension of the statute of limitations in this case was just such a "merely procedural" change.

The reclassification of the offense is more troublesome. The state argues that the reclassification was merely nominal, since Massarella, as the new Unified Code required, was permitted to choose between being sentenced under the Unified Code or under the law as it stood at the commission of the perjury. Massarella rationally chose to be sentenced under the later law, which set a higher fine but a lower maximum prison sentence for perjury.[3] He now contends that the reclassification of the offense, apart from direct changes in possible sentences, created a host of adverse collateral consequences.[4] that fall on a convicted felon. Whether this retrospective reclassification worsens the conditions imposed under the former state law is a federal question. See *Weaver* v. *Graham, supra*, 450 U.S. at 33; *Lindsey* v. *Washington*, 301 U.S. 397, 400 (1937). In this case, however, it is a question involving numerous and subtle issues of state law.

It is not at all clear that Illinois would not have considered Massarella a felon had he been convicted of perjury in 1971. In 1971 in Illinois, perjury was punishable

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[3] The state does not argue that this choice constituted a waiver of any of Massarella's rights under the *ex post facto* clause.

[4] These consequences include: ineligibility for state elective office, Ill. Rev. Stat. ch. 38, § 1005-5-5 (1973); longer curtailment of voting rights, Ill. Const. art. III, § 2 (1970); and disqualification from holding numerous licenses.

with a penitentiary sentence. Ill. Rev. Stat. ch. 38, § 32-2 (1969). Under a literal reading of the statutes then in force, the offense was thus a felony. *Id.* § 2-7. On this appeal, however, the state argues that Massarella now stands convicted of a misdemeanor, apparently conceding that the offense was so classed under former law, at least for the purpose of determining the collateral consequences of a perjury conviction.

We must, however, reject the state's argument that, by operation of a state statutory provision concerning the application of the Uniform Code of Corrections,[5] Massarella does not now stand convicted of a felony. For determining the period of limitation on Massarella's perjury prosecution, the state unquestionably classed the offense a felony. See Ill. Rev. Stat. ch. 38, § 3-5; *id.* § 32-2 (1973). Yet after conviction, the state argues a different *classification* of the offense from statutes dealing only with *punishment* of the offense. In short, the state has pointed to nothing to show that Massarella will not suffer the collateral consequences of which he complains. We hold, therefore, that Massarella's conviction of the retroactively reclassified offense of perjury violated the *ex post facto* clause.

The matter of remedies is a difficult one in this case. Massarella seeks an unconditional writ that would have the effect of vacating his perjury conviction. The Supreme Court, however, has noted that "[t]he proper relief upon a conclusion that a state prisoner is being treated

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[5] Ill. Rev. Stat. ch. 38, § 1008-2-4 (1973), provides that *sentences* under the Uniform Code apply "if they are less than under the prior law upon which the prosecution was commenced." The provisions of the Code are severable, should individual ones be held invalid. *Id.* § 1008-4-1.

under an *ex post facto* law is to remand to permit the state court to apply, if possible, the law in place when his crime occurred." *Weaver* v. *Graham, supra,* 450 U.S. at 36-37 n.22. (Citing *Lindsey* v. *Washington, supra,* 301 U.S. at 402.) In so remanding, we are confident that there is little need to point out the constitutional pitfalls of imposing on Massarella any more onerous sentence than he originally received.

Before remanding to the state court, however, the district court should resolve the fact question whether Massarella was fined $10,000 for his perjury conviction. If so, this fine would, under the principles noted above, be an *ex post facto* violation.

We have fully considered Massarella's other arguments and hold that none establishes errors for which habeas corpus relief is appropriate. The judgment of the district court is reversed, and the case remanded for action not inconsistent with this opinion.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
September 23, 1982.

Before
Hon. Richard D. Cudahy, Circuit Judge
Hon. John W. Peck, Senior Circuit Judge*
Hon. Thomas E. Fairchild, Senior Circuit Judge

UNITED STATES OF AMERICA ex rel.
BENEDETTO J. MASSARELLA,
Petitioner-Appellant,

No. 81-1571 vs.

RICHARD J. ELROD, Sheriff of Cook County, Illinois
and TYRONE FAHNER, Attorney General of Illinois,
Respondents-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 81 C 1752—Nicholas J. Bua, *Judge.*

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* The Honorable John W. Peck, Senior Circuit Judge for the Sixth Circuit Court of Appeals is sitting by designation.

ORDER

This case is before the court on a petition for rehearing and suggestion for rehearing *in banc* filed by the Respondent-Appellees and by the Petitioner-Appellant.

On consideration of the petitions, all members of the original panel having voted to deny a rehearing, and no judge in regular active service having requested a vote thereon, accordingly,

It Is Ordered that the aforesaid petitions for rehearing be and the same are hereby, Denied.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

THE UNITED STATES OF AMERICA
ex rel. BENEDETTO J. MASSARELLA,

Petitioner,

No. 81 C 1752 vs.

RICHARD J. ELROD, Sheriff of Cook County, et al.,

Respondents.

Before the Honorable
Nicholas J. Bua, *Judge*
United States District Court

ORDER

Presently before the court is Massarella's petition for a writ of habeas corpus. 28 U.S.C. § 2254. At a hearing on respondents' motion to vacate this court's April 1, 1980 Order setting bond, the parties agreed to submit the questions raised by the petition on the basis of the facts contained in their respective memoranda of law. The petition presents four grounds for relief.

The first issue raised by the petition is whether the application of Ill. Rev. Stat. ch. 38 § 32-2 (1973) to petitioner violated the constitutional ban on state *ex post facto* laws. U.S. Const., Art. 1, § 10, cl. 1.

The petitioner was convicted of perjury for statements made between August 26, 1971 and August 30, 1971. He was indicted for violating Ill. Rev. Stat. ch. 38 § 32-2. Under the 1971 version of the statute, in effect at the time the crime was committed, the petitioner could have been imprisoned in another penitentiary. Illinois courts had construed the statute as a misdemeanor because of this provision. *Cf. People* v. *Novotny*, 41 Ill. 2d 401, 244 N.E. 2d 182 (1968). The indictment was returned on June 8, 1973, beyond the 18 month limitation period applicable to a misdemeanor at the time the crime was committed. Ill. Rev. Stat. ch. 38 § 3-5. On January 1, 1973, one month before the limitations period for petitioner's crime would have expired, Illinois' Unified Code of Corrections took effect. The Unified Code classified perjury as a Class 3 felony with a three year statute of limitations. Ill. Rev. Stat. ch. 38 §§ 32-2, 3-5 (1973). The application of the new statute of limitations does not violate the *ex post facto* clause. *Clements* v. *United States*, 266 F.2d 397, 398 (9th Cir. 1959), *cert. denied*, 359 U.S. 985 (1959); *Roberts* v. *United States*, 239 F.2d 467 (9th Cir. 1957); Note, *Ex Post Facto Limitations on Legislative Power*, 73 Mich. L.Rev. 1491 at 1512 n.78 (1975).

The petitioner nevertheless argues that the legislative reclassification of perjury from a misdemeanor to a felony violates the *ex post facto* clause. The petitioner maintains that the state trial and appellate courts erroneously focused on the actual sentence imposed on the petitioner rather than the legislative "aggravation" of the offense caused by reclassifying perjury as a felony. *See Calder* v. *Bull*, 2 U.S. 386, 390 (1798) (separate opinion of Chase, J.).

What the petitioner conveniently fails to point out is that the petitioner, with the advice of counsel, chose to be sentenced in accordance with the 1973 version of the

perjury statute. The petitioner correctly quotes *Lindsey* v. *Washington*, 301 U.S. 397 at 401 (1937) for the proposition that

> the *ex post facto* clause looks to the standard of punishment prescribed by a statute rather than to the sentence actually imposed . . . [and] forbids the application of any new punitive measure to a crime already consummated, *to the detriment or material disadvantage* of the wrongdoer. (emphasis added).

However, the petitioner fails to focus on the fact that the import of the ban is the disadvantage imposed upon a wrongdoer without prior notice. The petition conspicuously avoids discussion of the fact that the petitioner had the option of being sentenced under the prior version of the statute. *People* v. *Liebling*, 36 Ill. App. 3d 1973 (1976). It appears that the petitioner must have considered himself benefited by the sentencing regime of the new act or he presumably would have chosen the old one. The respondents' brief in opposition to the petition for a writ of certiorari filed in the United States Supreme Court indicates that the petitioner in fact was given the choice as to which version of the statute he wished to be sentenced under. Thus, *Weaver* v. *Graham*, 49 U.S.L.W. 4155 (February 24, 1981) does not support the petitioner's contention, and this court concludes that his constitutional rights were not violated by the application of the 1973 version of the perjury statute to the petitioner's crime.

The petitioner's second claim is that he was deprived of his constitutional right to present a defense by the trial court's exclusion of certain evidence at trial. *See Chambers* v. *Mississippi*, 410 U.S. 284 (1973). The petitioner attempted to introduce evidence through Milton Lambert as an expert witness qualified by 40 years experience as

a wholesale distributor of motor fuel products. The defense attempted to establish the amount of fuel that the petitioner's business had sold during 1971 by hypothetical questions propounded to Lambert as an expert. The trial court sustained objections to Lambert's testimony based, among other things, upon his lack of personal knowledge, and because hypothetical questions propounded to him were based upon facts not in evidence. Based on the facts contained in the respondents' brief in opposition to the petition for a writ of certiorari filed in the United States Supreme Court, the court finds no deprivation of the petitioner's right to present a defense. The exclusion of Lambert's testimony simply did not materially affect petitioner's ability to present a defense. *Cf. Chambers* v. *Mississippi*, 410 U.S. 284 at 302 (1973).

The petitioner also claims that the trial court's exclusion of evidence pertaining to his conversations with his accountant rises to the level of a constitutional deprivation. According to respondents' brief referred to above, the trial judge sustained a hearsay objection to evidence of the petitioner's statement to his accountant to the effect that the petitioner thought his gross profit margins on motor fuel sales should have been higher in 1969 and 1970. The testimony was apparently offered to show Massarella lacked the intent to commit a theft of state motor fuel taxes. This hearsay exclusion does not constitute a constitutional deprivation under *Chambers, supra.* It certainly cannot be said that the exclusion of such ambiguous evidence was in any sense critical to petitioner's defense.

The third prong of Massarella's claim that he was deprived of due process at trial is based on the contention that the application of the "best evidence rule" to sustain the state's objection to the admission of certain docu-

mentary evidence deprived him of crucial exculpatory evidence. In light of the facts contained in the appendix to respondents' brief at p. 6a, this court believes it frivolous to assert that this evidence was either properly admissible in evidence or crucial to the defense.

The petitioner also maintains that his sixth amendment right to confront the witnesses against him was improperly abridged by the restrictions the trial judge placed upon his counsel's cross-examination of several prosecution witnesses and by its admission of prior testimony given in a civil suit by John Gavin, Sr.

In neither instance does the petitioner's brief allege a single fact from which this court can conclude that his constitutional rights have been violated. The state's brief indicates that the cross-examination of the four witnesses about which petitioner complains fills over two hundred pages of transcript. Absolutely no indication of an abuse of discretion has been presented by the petitioner in alleging that his right to confront and cross-examine the prosecutions' witnesses was unconstitutionally abridged.

Petitioner's contention that the introduction of prior testimony of a deceased witness deprived him of his rights is without foundation. From the briefs of the parties, it is clear to this court that such testimony was properly admitted and did not deprive petitioner of his constitutional right to confront the witnesses against him. *See Dutton* v. *Evans*, 400 U.S. 74.

Finally, we reject as unsupported by any evidence or authority the petitioner's contention that he was deprived of any rights by the manner in which the Illinois Appellate Court disposed of these claims on appeal. *See People* v. *Massarella*, 80 Ill. App. 3d 552, 400 N.E. 436 (1979), *cert. denied*, 49 U.S.L.W. 3493 (1981).

Nothing in the petition supports the claim that the cumulative effect of the evidentiary rulings complained of or the trial judge's supervision of the scope of petitioner's cross-examination of certain prosecution witnesses affected the fundamental fairness of petitioner's trial.

Therefore, the court's order of April 1, 1981 setting bail is vacated, and the petition for a writ of habeas corpus is DENIED.

IT IS SO ORDERED.

Nicholas J. Bua
Judge, United States District Court

DATED: April 7, 1981